

ДОСУДОВЕ РОЗСЛІДУВАННЯ

Rohatyuk Igor –
Candidate of Legal Sciences,
Honored Lawyer of Ukraine

THE ROLE OF THE PROSECUTOR DURING THE EXEMPTION FROM CRIMINAL LIABILITY DUE TO EFFECTIVE CONFESSION

The article deals with procedural matters the prosecutor's participation in the implementation of the Institute of the person's release from criminal liability in connection with the active repentance at the stage of pre-trial investigation.

Keywords: public prosecutor; pre-trial investigation; a release of person is from criminal responsibility; effective repentance; closing of criminal realization; restoration justice.

Розглянуто процедурні питання участі прокурора в реалізації інституту звільнення особи від кримінальної відповідальності у зв'язку з дійовим каяттям на стадії досудового розслідування.

Ключові слова: прокурор; досудове розслідування; звільнення особи від кримінальної відповідальності; дійове каяття; закриття кримінального провадження; відновне правосуддя.

Рассмотрены процедурные вопросы участия прокурора в реализации института освобождения лица от уголовной ответственности в связи с деятельным раскаянием на стадии досудебного расследования.

Ключевые слова: прокурор; досудебное расследование; освобождение лица от кримінальної відповідальності; дійсвенное раскаяние; закрытие кримінального веденія; восстановительное правосудие.

In recent years, government policy increasingly focused on protecting the interests of citizens from unwarranted criminal legal action. Punitive approach to solving the problems of combating

crime was ineffective. Given the increasing number of reported allegations and reports of crimes (from 1.8 million in 2000 to 3.3 million in 2012), as well as criminal proceedings in investigation units recognized priority use a differentiated approach to solving criminal conflicts concerning persons who have committed crimes do not constitute a great danger to society. These offenders, if stipulated by the law, appropriate to apply restorative justice institutions, including by way of exemption from criminal liability due to effective confession followed by the closure of criminal proceedings.

The study of the problematic issues exemption from prosecution engaged in Ukrainian and foreign scientists, including U. Baulin, S. Blagodyr V. Galagan, L. Golovko, P. Lupynska, V. Malyarenko, O. Mikhaylenko, V. Stepanov, A. Yaschenko et al. Conceptual Foundations alternative (restorative) justice in recent decades successfully implemented in law and practice around the world, because the aim of these measures is not only the restoration of the rule of law, but primarily redress harm to the victim, the victim reconciliation, repentance and rehabilitation of the offender, that helps to restore social justice without punishment of imprisonment [1]. According to the Code of Ukraine (Article 2), one of the objectives of the criminal proceedings recognized provide quick, full and impartial investigation into the trial, so that whoever committed the criminal offense was prosecuted as his guilt has not been a single innocent defendant or convicted, no one had been subjected to unjustified procedural coercion and that each party to the criminal proceedings was applied due process. In other words, there is the need for the appointment of the culprit just punishment, and, in certain cases - the refusal of the state to prosecute with the release of a person from criminal responsibility. Exemption from criminal liability is considered a kind of rejection of the state of conviction guilty of a crime without a conviction if the conditions and legal grounds, and if the same person agrees to this method of solving the case. Unlike the CPC in 1960, the new Code of Ukraine does not regulate in detail the procedure from prosecution for various reasons. Instead, it is determined that a person is exempt from criminal liability in cases stipulated by the Law of Ukraine on criminal responsibility (Part 1 of Art. 285 CC of Ukraine). This act of justice can only be made by the court on the basis of the preliminary

investigation in the case of: an effective repentance (Article 45 of the CC of Ukraine); reconciliation perpetrator and the victim (Article 46); transmission bail (Article 47); changing circumstances (Article 48); expiration of the limitation period (Article 49).

If a person who is suspected or accused of a criminal offense in the first case pleads guilty, honestly repent in the act, actively contribute to detection of crime; the second – reconciled with the victim, the state will reimburse the incurred loss or eliminate the harm; the third – plead guilty, repent sincerely in the act, employees and assure the court in his impeccable conduct in the future; in the fourth quarter – a result of changing conditions is no longer socially dangerous act, or it has lost public danger; in the fifth – to be exempted from criminal liability in connection with the lapse of time, under part 1 of article. 49 CC of Ukraine, the suspect or accused explained eligible for this type of exemption from criminal responsibility for compliance with these conditions.

Consequently, the Institute for exemption from criminal liability can be regarded as in terms of criminal law and criminal procedure, because each application is enshrined in law the grounds for exemption from criminal liability simultaneously regulated by appropriate both material and procedural rules.

The writings of scholars in the field of substantive criminal law did not find significant differences in the interpretation of the exemption from criminal liability. Each of the proposed definitions emphasize the key attribute of this as rejection of the state of the application to a person who committed a crime under criminal law consequences [2, p. 77; 3, p. 58]. As a generalization of judicial practice of the Supreme Court of Ukraine exemption from criminal liability is also regarded as a waiver of the state (its competent authorities) on conviction of the offender, and applying it to criminal means of coercion. Closing cases of such persons is an expression of the general trend of criminal law in the direction of liability for crimes of small and moderate committed for the first time, the legislative embodiment of the state of humanity, giving the state the person, the possibility of reform. At the same time states that the exemption from criminal liability can not be considered an excuse for people [4]. Institute of effective repentance – a comprehensive legal institution, which is a collection of criminal and criminal procedural law

governing social relations that determine positive after criminal behavior suspect or the accused and to the availability of legal basis and subject to the conditions that are required under time exemption from criminal liability and closure of criminal proceedings.

It is necessary to distinguish between «repentance» as a special circumstance that, without prejudice to the criminal liability mitigates punishment (Section 1, Part 1, Art. 66 of the Criminal Code of Ukraine), and «effective confession» (Article 5 of the CC of Ukraine) as an excuse from criminal liability. For exemption from criminal liability due to effective confession investigators should establish conditions (base) set forth century. 45 Criminal Code of Ukraine, namely the fact of a person or a minor offense of careless Misdemeanor; the fact of the crime for the first time ; fact of effective regret person. The latter is characterized by three elements: a sincere repentance in crime, active assistance in detecting crime and complete compensation for damages that person or elimination of damages [3, p. 130]. The discussions that arise in the analysis of the practice of the institution of effective regret, due to the fact that Art. 45 Criminal Code of Ukraine are several actions that collectively execute a person before her release from liability and closing proceedings. These actions V. Mikhalov calls «signs of effective repentance» [5, p. 5]. L. Golovko rightly notes that the reason of concentrated very different legal effects that contribute to the successful investigation and eliminating the negative effects of crime. Therefore, the question arises: is it possible to release a person from criminal responsibility by closing the proceedings in the case of some (or even one) of the hallmarks of effective regret or always required for the complete set of them? [6, p. 88].

On average among expressed opposing views. Yes, A. Savkin believes that an effective signs of remorse should be considered only in their totality, the unity and interconnectedness. The presence of only one of them is effective confession, but merely the fact that mitigates liability. In other words, if a person only served to detect and prevent criminal offenses or only compensated the damage, then release her from criminal liability is not sufficient grounds [7, p. 35]. However, it is obvious there is a situation where all signs of repentance on behalf of demand is impossible, and therefore we support the position that which is not legally required in each case, the

full set of these features. For example, if the commission of a crime is not caused harm, then compensate or eliminate it is not necessary, since this condition is possible only if the present action in the order of Art. 128 Code of Ukraine. So, noteworthy opinion LV Head that all conditions must be evaluated in each case and be reflected in the procedural decision making which is quite possible, and in the absence of one of the hallmarks of effective repentance [6, p. 344].

In legal literature consolidate their position about the possibility of exemption from criminal liability due to effective confession for crimes of medium gravity [8]. It is proposed to extend this capability exemption from prosecution for all crimes that are not serious consequences [9, p. 100]; in economic activity [10, p. 101]; nonviolent crimes against property [11, p. 196]. According to scientists, is the opportunity to influence the wine on redress for his injury. As noted by Y. Groshevoi, exemption from criminal liability provides complete elimination of all harmful effects caused by crime, with the update of the initial state [12, p. 694–695]. Misdemeanor is a crime for which the predicted primary punishment of a fine not exceeding ten thousand untaxed minimum incomes, or imprisonment for a term not exceeding five years. (Part 3. 12 of the Criminal Code of Ukraine). With regard to this objective procedural conditions of effective repentance as negligence in the commission of the crime of medium gravity, then the training legislator soil the mental attitude of the person exerted to the act or omission and its consequences, that is negligence (Article 23). The absence of that person is aware of and provided for, wanted, or knowingly assumed the occurrence of certain dangerous consequences, is the main feature of negligence (in the form of criminal arrogance or criminal negligence), including murder by negligence (Part 1 of Art. 119), reckless destruction or damage property (Article 196), careless storage of a firearm or ammunition (Article 264) and others.

In our opinion, legally distribute possibility of release of persons from criminal liability for intentional Misdemeanor impractical because this could lead to an increase in crime and other socially harmful effects. But consider this as a mitigating circumstance in sentencing and an agreement between the prosecutor and the suspect plea or conciliation, as it is stated in the Code of Ukraine, is objectively necessary.

Based on the content of art. 285 CC apply for exemption from criminal liability under preliminary investigation is possible only in relation to the suspect. According to Art. 42 Code of Ukraine, is suspected person who in the manner prescribed by CC notified suspect or person detained on suspicion of committing a criminal offender movement. Suspected reported in the following cases: detention of a person while committing a criminal offense or immediately after its commission; the election of the person of a prescribed Code of Ukraine precautions; sufficient evidence to suspect a person of having committed a criminal offense (p. 276). Suspected reported by passing messages suspicion that agrees with the prosecutor (articles 276–278).

The person who was notified of the suspicion has to be handed a copy of the memo and the procedural rights and obligations of the suspect. At the same time the rights of the suspect list, embodied Part 3. 42 Code of Ukraine, is not about compulsory clarification possibility of exemption from criminal liability for the commission of socially useful actions, which are stated in the Criminal Code of Ukraine, what, in our view, requires making appropriate amendments to Art. 42.

One of the procedural conditions for exemption from criminal liability is no relevant objections from the suspect or the accused (defendant). In recent years the practice became widespread cases where prosecutors or investigative units, due to the impossibility of proving the guilt of the suspect (accused) took the decision to refer the case to the court for closure , notably because of compulsory remorse. To do this, the defendant explained that if found it the fault of a crime and giving consent to the termination of criminal proceedings (for CPC 1960), it will be closed without any consequences for it. Communicating with Persons to whom the decision to close a criminal case on the grounds shows that the difference between the closing of the case for rehabilitating and grounds investigator (prosecutor) they do not actually explained.

Clearly the issue is not resolved in the new Code of Ukraine. For example, in Art. 285 states that the suspect, the accused, who may be relieved of criminal responsibility should be explained the essence of suspicion or accusation, an excuse from criminal responsibility and the right to object to the closure of criminal proceedings for that reason. If the suspect or the accused in respect of which provided for exemption from criminal liability, opposed to

this, the pre-trial investigation and court proceedings are conducted in full to the general procedure. However, no person explains the consequences of such a release.

We believe that this uncertainty may lead to unacceptable «pressure» of the investigation to the suspect, the accused in order to give consent for their latest release from criminal liability. This is because in case of failure of the person giving consent to a dismissal of the investigator (prosecutor) will be required to conduct an investigation in full, which is not always consistent with their interests or real prospects investigation.

In order to avoid possible inconsistencies in these situations, we believe it is necessary to supplement Art. 285 CC Ukraine provisions, however acknowledged the duty of the investigator to explain the effects of the closure of an accused criminal proceedings or rehabilitating bases, possibly in a separate protocol at the end of which is necessary to provide the position as follows: with respect to release me from prosecution in connection with mind / do not mind. According to the Code of Ukraine (paragraph 1 of Part 2 of Art. 284), criminal proceedings in connection with the release of a person from criminal liability only closed court (as before). But such a dismissal procedure has changed. Installing under preliminary investigation grounds for excluding criminal responsibility and the consent of the suspect to a release, the prosecutor makes a request for exemption from criminal liability and without pre-trial investigation in its entirety sends it to court (part 2 of Art. 286). If the side of the criminal proceedings would go to court with a petition for exemption from criminal liability of the accused are in the course of the proceedings, the court shall promptly consider the request (part 4 of Art. 286). That is the prosecutor who decides on the exemption from criminal liability under preliminary investigation must, first, to obtain the consent of the suspect in a release and at the same time to make necessary procedural steps, including make a request for exemption from criminal liability.

REFERENCES

1. Бетті Вос. Впровадження відновного правосуддя до правової системи України. Оцінка Програми. Підсумковий звіт [Електронний ресурс] / Бетті Вос, Марк С. Умбрайт, Торан Хансен // Впровадження відновного правосуддя в

Україні: висновки та перспективи : матеріали Міжнар. конф. (Київ, 20–21 квіт. 2006 р.). – Режим доступу :

http://www.commonground.org.ua/ukr/20060420_RJConf.html.

2. Губська О. А. Процесуальні питання звільнення особи від кримінальної відповідальності за nereабілітуючими обставинами : дис. ... канд. юрид. наук : 12.00.09 / Губська Олена Анатоліївна. – К., 2002. – 209 с.

3. Баулін Ю. В. Звільнення від кримінальної відповідальності : [моногр.] / Ю. В. Баулін. – К. : Атіка, 2004. – 296 с.

4. Про практику застосування судами законодавства, що регулює закриття кримінальних справ Узагальнення судової практики Верховного Суду від 20 лют. 2004 р. [Електронний ресурс]. – Режим доступу :

<http://zakon1.rada.gov.ua/laws/show/n0003700-04>.

5. Михайлов В. А. Признаки деятельного раскаяния / В. А. Михайлов // Российская юстиция. – 1998. – № 4. – С. 5.

6. Головкин Л. В. Альтернативы уголовному преследованию в современном праве / Л. В. Головкин. – СПб. : Изд-во «Юрид. центр Пресс», 2002. – 544 с.

7. Савкин А. Деятельное раскаяние – свобода от ответственности / А. Савкин // Российская юстиция. – 1997. – № 12. – С. 35–39.

8. Тертишник В. Компромiс у кримінальному процесі / В. Тертишник // Підприємництво, господарство і право. – 2002. – № 11. – С. 107–110.

9. Кушнарєв В. А. О необходимости совершенствования института деятельного раскаяния / В. А. Кушнарєв // Российский следователь. – 2001. – № 2. – С. 18–21.

10. Матюшенко Р. Звільнення від кримінальної відповідальності у зв'язку з дійовим каяттям / Р. Матюшенко // Право України. – 2002. – № 8. – С. 99–101.

11. Житний О. О. Звільнення від кримінальної відповідальності у зв'язку з дійовим каяттям : дис. ... канд. юрид. наук : 12.00.09 / Житний Олександр Олександрович. – Х., 2003. – 211 с.

12. Грошевий Ю. М. Проблеми вдосконалення законодавства, що регулює кримінально-процесуальну діяльність / Ю. М. Грошевий // Вісник Академії правових наук України. – 2003. – № 2–3. – С. 694–695.